IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-150655 TRIAL NO. B-1404501
Plaintiff-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
GREGORY KIMBLE, JR.,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

On August 9, 2014, Kimble was pulled over by Cincinnati Police Officer Darrin Hoderlein. According to Hoderlein, he positioned his vehicle approximately 15 yards behind Kimble's van with his cruiser facing the driver's side of the van. Kimble was removed from the vehicle and placed in the back seat of Hoderlein's cruiser. Hoderlein testified that another officer retrieved Kimble's wallet from the van and handed it through the front passenger window of the cruiser to Hoderlein, who was sitting in the front seat. Hoderlein claimed that when he opened the wallet to retrieve the identification, a white powder spilled out from a ripped baggie onto Hoderlein's pants and the front seat. Hoderlein testified that Kimble denied knowing what the powder was or how it got into his wallet.

Hoderlein testified that his cruiser's recording device would have been running during the stop. He was not sure if the camera was facing forward showing the scene in front of the cruiser, or backward showing the interior of the cruiser. But he testified that he normally would have switched the camera backward whenever there was a person in the back seat of the cruiser.

On October 22, 2014, Kimble's counsel issued a subpoena to "City of Cincinnati Police Communications" asking for "the CAD, MVR, MDC, 911 for an

incident 8-9-14 at or about 1217 hours, at 14 W. Liberty Street Cincinnati, Ohio. P.O. Hoderlein was involved." The subpoena demanded that the responsive materials be brought to the trial court on November 4, but there was no hearing set on that date. The trial court did have a plea or trial setting date set for November 5, but that date was continued at the request of the defense. The record does not indicate if any requested items were produced in the courtroom on November 4, but defense counsel never filed a motion for contempt pursuant to Crim.R. 17(G).

The case was continued several additional times at the request of the defense, until new counsel was eventually appointed. On May 26, 2015, newly-appointed counsel filed a demand for discovery, a request for a bill of particulars, and a motion to preserve any and all video or audio recordings. Pursuant to the policy of the Cincinnati Police Department, the video had been purged from the system 90 days after the arrest, which would have been November 7, 2014. The motion to preserve evidence was not filed until May 26, 2015.

Counsel for Kimble filed a motion to dismiss the indictment for failure to preserve the video recording. After a hearing, the motion was denied. The case proceeded to a jury trial. The jury found Kimble guilty of possession of heroin. The trial court sentenced him accordingly.

In his sole assignment of error, Kimble claims that the trial court erred when it failed to dismiss the charge against him because his right to due process was violated when the video recording of the incident was erased. The state's failure to preserve materially exculpatory evidence violates a defendant's due-process rights under the Fourteenth Amendment to the United States Constitution. *State v. Benson*, 152 Ohio App.3d 495, 2003-Ohio-1944, 788 N.E.2d 693, ¶ 10 (1st Dist.), citing *California v. Trombetta*, 467 U.S. 479, 488-489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). But even if the evidence is not exculpatory, the failure to preserve evidence that is potentially useful violates a defendant's due-process rights where the

police or the prosecution acts in bad faith. *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1, syllabus.

Typically, the defendant bears the burden to prove that the evidence was materially exculpatory. *Benson* at ¶ 11, citing *State v. Jackson*, 57 Ohio St.3d 29, 33, 565 N.E.2d 549 (1991). But where the defendant moves to have the evidence preserved and the state destroys the evidence, the burden shifts to the state to show the inculpatory value of the evidence. *Benson* at ¶ 11 , citing *State v. Benton*, 136 Ohio App.3d 801, 805, 737 N.E.2d 1046 (6th Dist.2000).

In this case, Kimble filed neither a motion to preserve the recording nor a specific discovery request for the video in a timely manner. Instead, he chose to serve a subpoena on law enforcement requiring production of the evidence on November 4, a date for which no hearing was set. In addition, counsel failed to utilize the appropriate remedy for seeking redress for its nonproduction. *See* Crim.R. 17(G). And unlike the service of a motion to preserve evidence or a specific discovery request, there was nothing about the subpoena that would have put law enforcement on notice that retention of the evidence beyond the November 4 date was being requested.

While substitute counsel did file a motion to preserve the video recording, it was filed after the video had been deleted from the server pursuant to the city's retention policy. When "evidence is destroyed pursuant to routine procedures before any request for it has been made, it is not the State's burden to show that the evidence was not exculpatory, but rather Defendant's burden to show that it was exculpatory." *State v. Terry*, 2d Dist. Greene No. 04CA63, 2004-Ohio-7257, ¶ 15. Therefore, it remained Kimble's burden to show that the video recording was either exculpatory or potentially useful and destroyed in bad faith.

Kimble has failed to show that the video recording was materially exculpatory. According to the testimony at the hearing, the video recording would

have captured either an officer walking Kimble's wallet back to the cruiser or the drugs pouring out of it, or it would have captured Kimble's accusation of planting the evidence by the police. It would not have shown how the drugs got into the wallet. And Kimble's statement that the contraband was planted, standing alone, would not have been exculpatory.

Kimble has also failed to show that the video recording, while potentially useful, was erased in bad faith. The term "bad faith" generally implies something more than bad judgment or negligence. *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 81. "It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another." *Id.*, quoting *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 276, 452 N.E.2d 1315 (1983).

The only evidence in the record is that the video was purged as part of the city's ongoing retention policy. Generally, following a retention policy fails to demonstrate the necessary malice required to show bad faith, and Kimble has failed to demonstrate why this case should be different. *See State v. Woodson*, 10th Dist. Franklin No. 03AP-736, 2004-Ohio-5713, ¶ 28 (holding that there was no bad faith on the part of either the prosecution or the police when evidence was destroyed in accordance with standard procedures).

Because Kimble served his subpoena requesting evidence production on a date when there was no hearing in the case and failed to follow the proper procedures outlined in Crim.R. 17(G) to secure production, the state was not put on notice that retention of the video recording was required beyond the date on the subpoena. And because Kimble failed to show that the video recording was either materially exculpatory or erased in bad faith, the trial court properly overruled his

motion to dismiss the indictment. We overrule Kimble's sole assignment of error and affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., CUNNINGHAM and **ZAYAS, JJ.**

To the clerk:

Enter upon the journal of the court on June 9, 2017

per order of the court _____.

Presiding Judge